No. 21,928

United States Court of Appeals

For the Ninth Circuit

Ernest Douglas Brede, *Appellant,* vs. United States of America, *Appellee.*	

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANT

Clark A. Barrett,
315 Montgomery Street,
San Francisco, California 94104,
Counsel for Appellant.

FILED
DEC 15 1967
WM. B. LUCK, CLERK

DEC 21 1967

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

urisdiction 1

tatement of the case 2

tatement of facts 3

uestions presented and how raised 10

pecification of errors 13

rgument 14

Summary 14

I

No valid "order to report for civilian work" was ever issued or directed to the appellant by his local selective service board 15

II

After advising the appellant that his classification was still under review, and requiring him to submit new information, the local Board failed to consider the new information 24

III

The purported "order" to report for civilian work was not valid, as it was not signed by any duly authorized person 27

IV

The purported order to report for civilian work was improperly issued, as there was no evidence that the work in question was "currently available" 31

Conclusion 32

Table of Authorities Cited

Cases

Page

Atkins v. U.S., 204 F. 2d 269 (10th Cir., 1953) 23

Boyd v. U.S., 269 F. 2d 607 (9th Cir., 1959) 23

Franks v. United States, 216 F. 2d 266 (9th Cir., 1954) 29

Pages

Knox v. United States, 200 F. 2d 398 (9th Cir., 1952)..... 29

Kretchet v. United States, 284 F. 2d 561 (9th Cir., 1960) 29

United States v. Alvies, 112 F. Supp. 618 (N.D. Cal. 1953) 30

United States v. Stetler, 258 F. 310 (3rd Cir., 1958)...... 30

U.S. v. Zieber, 161 F. 2d 90 (3rd Cir., 1947).............. 23

Statutes

32 CFR:

Section 1602.4 25

Section 1604.56 ....22, 28

Section 1604.59 ....17, 22, 27, 28

Section 1623.1(a) 20

Section 1623.1(b) 25

Section 1631.7 23

Section 1632.1-16 23

Sections 1642.10-1642.21 25

Section 1660.20 7

Section 1660.20(c) 16, 20

Section 1660.20(d) 16

Section 1660.30 21

18 U.S.C. Section 3231 1

28 U.S.C. Section 1291 2

28 U.S.C. Section 1294 2

50 U.S.C.A. Section 462 (Universal Military Training and Service Act) 1

50 U.S.C.A. Section 462(a) 15

Rules

Federal Rules of Criminal Procedure:

Rule 37(a)(1) 2

Rule 37(a)(2) 2

Other Authorities

Local Board Memorandum No. 64, National Director of the Selective Service System, March 1, 1962, "Subject—Civilian Work in Lieu of Induction", para. 7 32

No. 21,928

United States Court of Appeals
For the Ninth Circuit

Ernest Douglas Brede,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California (CT 2).[1] The District Court had jurisdiction pursuant to Title 18, United States Code, Section 3231.

The indictment charged an offense in violation of the Universal Military Training and Service Act (Title 50, United States Code App., Section 462)—Failure to Report for Civilian Work (CT 2).

---

[1]Numbers preceded by "CT" denote the applicable pages of the Clerk's Transcript of the Record.

This Court has jurisdiction of this appeal pursuant to Title 28, United States Code, Sections 1291, 1294 and Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure, as the Notice of Appeal was filed in the time and manner required by law (CT 11-12).

STATEMENT OF THE CASE

Appellant was charged by an indictment alleging that on or about May 3, 1966 in the City of San Mateo, County of San Mateo, he:

> "wilfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules and regulations and direction duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report to said board for instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California, (place of employment) to report for employment pursuant to such instructions, and to remain in such employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority." (CT 2)

After pleading not guilty (CT 13) and waiving trial by jury (CT 3), appellant was tried by the Court on May 18, 1967 (CT 13-14). Appellant was found guilty as charged on May 18, 1967 (CT 14), and was sentenced to imprisonment for 18 months on May 23, 1967 (CT 10).

STATEMENT OF FACTS

Appellant was 20 years old at the time of his conviction. He became 18 years old on May 30, 1956, and registered with his local board in San Mateo, California shortly thereafter (F 1, 2).[2] On June 30, 1964 he completed his classification questionnaire (SSS Form No. 100) in which he indicated that he had been an ordained minister of Jehovah's Witnesses since 1959; that he was a student preparing for the ministry pursuing a full-time course of instruction, and that he was a conscientious objector. He indicated that he had no other occupation and stated "Prefer minister's classification" (F 7-9). He received the Special Form for Conscientious Objector (SSS Form No. 150) from his local board and completed and returned it by August 10, 1964 (F 22-25). The appellant claimed exemption from both combatant and non-combatant training and service in the armed forces (F 22). He also received, completed and returned to the local board by August 10, 1964 the questionnaire for registrants claiming IV-D in which the appellant explained his duties as a minister, his attendance at ministry school, indicated that he attended five congregation meetings weekly, and described other ministerial activities. The registrant indicated that he was then working about 40 hours per week as a house painter, but stated "I plan within the next year to become

---

[2]Numbers preceded by "F" appearing in parenthesis herein refer to the pages of the Selective Service File (plaintiff's Exhibit 1.) Such page numbers, written in longhand, generally appear at the bottom of each page in the file.

a full-time Pioneer [Minister] and get a part-time job to support myself" (F 14-21).

Appellant was thereafter classified as I-O on September 14, 1964 by his local board. He did not appeal this classification (F 12).

Although appellant's Selective Service No. was not reached for induction until December 22, 1965 (F 59), the local board started to process him for civilian work in lieu of induction in November, 1965, by sending to him the "Special Report for Class I-O registrants" (SSS Form No. 152) (F 39-42). This form specifically advised appellant that if he did not submit three types of approved civilian work which he would offer to perform in lieu of induction the local board would submit three such types of approved work to him thereafter. He was advised in writing that if he did not accept any of these types of work, he would have a meeting with the local board in an attempt to reach an agreement with the board as to the type of work he would perform. This statement then provided:

> "If no agreement can be reached at such meeting *the local board, after approval by the Director of Selective Service, will order you to perform such work as is deemed appropriate by the local board."*[3]

This same written statement to the appellant further provided that *after* the local board has received approval by the Director of Selective Service, and

[3]In this instance as in all others throughout this brief unless otherwise noted, empahsis is supplied.

after the local board orders him to perform such work, he would be "mailed an Order to Report for Civilian Work and Statement of Employer" (SSS Form No. 153) (F 39).

The appellant returned the Special Report for Class I-O Registrants to his local board on November 29, 1965, but did not offer to perform any civilian work in lieu of induction (F 40).

Three days later, on December 20, 1965, the local board forwarded appellant's file to California State Headquarters, requesting that the State Director forward three types of available appropriate employment (F 43). On December 22, 1965 the State Director returned the file to the local board indicating that three specified types of civilian work were "available . . . *at the present time*" (F 44).

On January 3, 1966 the local board forwarded to appellant the three types of work specified by the State Director. The appellant returned this letter indicating that he did not wish to perform any of the types of work indicated because of his conscientious objection; he indicated that he was an ordained minister and that to perform this work would be a compromise with his dedication to God (F 45-46).

Subsequently, the appellant's file was again forwarded to State Headquarters for instructions as to the appointment of a state representative to meet with the registrant (F 47). The State Director notified the local board on January 28th as to the procedure to be followed and stated *inter alia*,

> "Unless the file contains *current* information that such work is available, the State Director should be requested to obtain such information" (F 48).

On February 7, 1966, the appellant was directed to appear at a meeting with his local board on February 14th (F 49). Although appellant appeared on February 14th at the local board, there was no representative of the State Director present. The local board therefore considered this matter and, by a vote of 3-0, advised the appellant that the interview would be rescheduled and that he would be advised of a new date (F 12).

On February 25, 1966, State Headquarters wrote to the local board advising them that their letter of February 7th addressed to the appellant was *a violation of the Selective Service Regulations* and that a new meeting should be scheduled later (F 50). The registrant was subsequently advised of a meeting to be held on March 14, 1966 (F 51).

After meeting with the appellant on March 14, 1966, the local board determined, again by a vote of 3-0, that work as an institutional helper at the Los Angeles County Department of Charities was appropriate to be performed by the appellant, and that such work was available. The minutes of this meeting are signed by J. MacLeod, Clerk (F 52).

The action of the local board on March 14, 1966 did *not* constitute an "order" that this appellant report for civilan work in lieu of induction, as the local board

did not have authority or jurisdiction to so order him at that time. It only received authority and jurisdiction to order the appellant to report for civilian work *after* it had received the approval to do so from the National Director (CFR Sec. 1660.20). Nor did the local board authorize its Clerk to order appellant to report for civilian work on March 14, 1966.

The Selective Service file next indicates that the local board desired more information relating to the appellant, for on March 15, 1966, a "Current Information Questionnaire" (SSS Form 127) was sent to him, also signed by J. MacLeod (F 53). This questionnaire includes the following language:

> "The law requires you to fill out and return this questionnaire on or before the date shown to the right above in order that your local board *will have current information to enable it to classify you*" (F 53).

The final statement on said questionnaire advised the appellant of the penalty for knowingly making any false statement or certificate *"regarding or bearing upon a classification"* (F 54).

Appellant returned this form on March 24, 1966 (F 53). For the first time in almost two years, from the date of his registration on June 4, 1964, the appellant indicated to the local board that he was employed as a cashier (F 54). In none of his previous reports to the local board did the appellant indicate that he had any other work experience than as a house-painter (F 7, 18, 23, 41). This was new information that had never

before been considered or available to the local board, and which might have influenced the local board as to the type of civilian work the registrant should be ordered to perform in lieu of induction.

Notwithstanding this new information, the same day the Current Information Questionnaire was returned to the local board the appellant's file was forwarded to State Headquarters for transmitting to the National Director requesting "that the Director approve and authorize the ordering of subject registrant to perform the above specific work." The letter of transmittal was signed by J. MacLeod, Clerk (F 55).

On March 28, 1966 California State Headquarters forwarded appellant's file to National Headquarters, indicated that the local board had determined that specific civilian work was available and stated "the local board *requests authority* to so order him" (F 58). The Director of Selective Service notified State Headquarters on April 14, 1966 that "the issuance of an order by the local board . . . is approved" (F 57).

The State Director of Selective Service wrote to the local board on April 19, 1966, returned the file of the appellant to the local board, and advised the local board that the National Director had given his approval for the appellant to be ordered to report for civilian work in lieu of induction. It should be noted that this letter is addressed, *not to the clerk of the local board,* but to "Gentlemen"—the board members themselves. The letter specifically provides that "the *registrant should be ordered to report* to his local

board office . . .", and that the *clerk* should take certain specific action as to preparation of instructions, preparing a statement in the event the registrant failed to appear, etc. (F 56).

The minutes of the local board indicate that it *did not meet* after receiving the new information concerning the appellant's actual employment, *did not meet* after the National Director granted authority to the board to order the appellant to report for civilian work, *did not authorize the purported "order to report for civilian work" to be sent,* and *did not order the appellant to perform such work* (F 13).

In spite of the fact that the local board had not considered the information it had requested in the "current information questionnaire", had not met after receiving authorization from the National Director, had not ordered the appellant to report for civilian work, and had not authorized the clerk of the board to issue such an order, on April 22, 1966 a purported "Order to Report for Civilian Work" (SSS Form No. 153) was sent from the local board office by Barbara Jones to the appellant herein, in which it was indicated that he was to report to the local board on May 3, 1966, to receive instructions to proceed to the place of employment (F 60).

As of March 24, 1966 J. MacLeod was *the only person* designated as the *Clerk* of the local board (RT 23).[4]

---

[4]Numbers preceded by "RT" denote the applicable pages of the Reporter's Transcript of the trial proceedings.

It appears that Barbara Jones did not actually have the position as Clerk of local board 57 until September 19, 1966 (RT 26; Defendant's Exhibit "B"). Although Barbara Jones purportedly signed the order of April 22, 1966 as Clerk of the local board, *she was not even recommended for appointment as Clerk until June 21, 1966,* two months *after* the purported "Order" was sent to appellant (RT 28-29; Defendant's Exhibit "C").

The reverse of SSS Form No. 153 further indicates that official local board action is necessary to order any registrant to report for civilian work. The instructions on the reverse provide in part:

> "An original and five copies of this form shall be prepared by the local board for each registrant *ordered to report for civilian work contributing to the national health, safety, or interest.*" (F 61)

The appellant received the purported order to report as indicated by his letter to the board of May 2, 1966 (F 63-66), but refused to report because of his religious convictions. The file reflects the fact that the appellant did not report on May 3, 1966 (F 67). This prosecution followed.

QUESTIONS PRESENTED AND HOW RAISED

I

If a local board has received *authority* from the National Director of the Selective Service System to order a registrant to perform specific civilian work in lieu of induction, but *does not thereafter meet, does*

not consider the registrant's file, does not make or issue an order to report for civilian work, and does not authorize its Clerk to do so, may such an order to report nevertheless be issued by one of the clerical personnel at the local board's office?

II

As the governing selective service regulations provide that "official papers issued by a local board may be signed by the Clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board," may an Order to Report for Civilian Work be directed to a registrant when (1) such order was not issued by the local board, (2) the Clerk was not authorized to issue such an order, and (3) the order was signed by one of the clerical personnel who had not been appointed Clerk?

III

After a local selective Service board requires a registrant to provide "current information to enable it to classify you", and after receipt of new information from the registrant which might have influenced the local board as to the type of civilian work the registrant should perform in lieu of induction, is the local board justified in ignoring this new information or the effect it might have on the registrant's classification or the work to which he would be assigned? Is the failure to consider such information a denial of substantive or procedural due process?

IV

When the California State Director of the Selective Service System specifically advises a local board that unless the registrant's file contains "current information" that specific civilian work is available, the local board should contact the State Director, does the local board have the authority to issue an Order to Report for Civilian Work some 4½ months after it has been advised that certain work is available, without seeking further information from State Headquarters?

V

Were procedural and substantive due process denied to appellant by his local selective service board in matters relating to his classification and the purported "Order to Report for Civilian Work" in lieu of induction?

VI

Did the Trial Court err in denying appellant's motion for judgment of acquittal, as the evidence produced at the trial was legally insufficient to sustain a judgment of guilty?

All of the aforesaid questions were raised by appellant's motion for judgment of acquittal presented to the trial court at the close of the government's case (CT 4-9); (RT 37-60; 70-76).

SPECIFICATION OF ERRORS

1. The District Court erred in denying appellant's motion for judgment of acquittal as no valid "Order to Report for Civilian Work" was ever issued or directed by the local selective service board.

2. The District Court erred in denying appellant's motion for judgment of acquittal as the local selective service board never authorized its Clerk to issue the purported Order to Report for Civilian Work directed to this appellant.

3. The District Court erred in denying appellant's motion for judgment of acquittal as the purported Order to Report for Civilian Work was not signed by the Clerk of the local board, as required by Selective Service Regulations.

4. The District Court erred in denying appellant's motion for judgment of acquittal as the local board specifically requested new information concerning appellant's current status, and yet failed to meet or consider the new information after the appellant had provided the board with it.

5. The District Court erred in denying appellant's motion for judgment of acquittal as the purported Order to Report for Civilian Work was sent from the local board office without any indication that the work appellant was purportedly ordered to perform was in fact "currently available".

6. The District Court erred in denying appellant's motion for judgment of acquittal as the evidence produced at the trial demonstrated that appellant was

deprived of both procedural and substantive due process by his local board.

7. The District Court erred in denying appellant's motion for judgment of acquittal as the evidence produced at the trial was legally insufficient to sustain a judgment of guilty.

ARGUMENT

SUMMARY

There are three principal points upon which the appellant relies in this appeal. They are as follows:

1. The local board did not have authority to issue any order to report for civilian work in lieu of induction unless and until it had received authorization from the National Director. Further, that after receiving such authorization, the local board did not meet, did not consider the registrant's file, did not issue such an order itself, and did not authorize its Clerk to do so. In such circumstances, appellant submits that the presumption of administrative regularity cannot overcome the absolute failure of proof in the government's case. If there were any doubts as to the validity of the purported order, as the appellant is entitled to a presumption of innocence, the doubts should have been resolved in his favor.

2. As the local board required the appellant to submit a "Current Information Questionnaire", when the appellant provided new information which might have had a bearing upon the appellant's classification or the type of civilian work he would be ordered to

perform, the local board failed to afford appellant procedural and substantive due process as it did not consider this new information. The local board was without jurisdiction to delegate matters of discretion and policy to a clerk to determine whether or not the new information submitted might or might not have effected local board orders.

3. The Selective Service Regulations specifically provide that only members of the local board or the Clerk thereof may sign official documents, and that the Clerk may do so only if authorized by resolution. In this case, although the Clerk of the Board was in the same office, the purported order was issued over the signature of one of the clerical personnel who had not even been recommended for appointment as Clerk at the time she signed the order. The order was, therefore, not validly issued.

I

NO VALID "ORDER TO REPORT FOR CIVILIAN WORK" WAS EVER ISSUED OR DIRECTED TO THE APPELLANT BY HIS LOCAL SELECTIVE SERVICE BOARD

The United States Code, Title 50 App., Section 462(a), provides penalties for any person who neglects or refuses "to perform any duty required of him." The only "duty" referred to in the indictment against the appellant in this case is an alleged "order of his local board to report to said board for instructions . . ." (CT 2). Therefore, unless there was, in fact, a valid order of the local board directing appellant to perform

a duty required of him, the defendant should have been acquitted by the District Court and his conviction should now be reversed by this Court. The defendant contends that no valid order was ever issued by the local board, and that he therefore did not commit any criminal act in failing or refusing to perform any purported order.

The two crucial dates in this regard are March 14, 1966—the date of appellant's meeting with his local board—and April 22, 1966—the date the purported "order" was sent from the local board office by one of the clerical personnel.

The appellant does not contend that there was any procedural or substantive error concerning local board action prior to March 14, 1966. On that date the appellant, a representative of the State Director, and the local board met pursuant to the specific provisions of Selective Service Regulations, Section 1660.20(c).[5] As no agreement was reached at that meeting as to the type of work to be performed, the local board was required to follow the specific procedures set forth in Section 1660.20(d) of the regulations.[6] This Section is as follows:

> "If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective

[5] 32 CFR Section 1660.20(c).

[6] 32 CFR Section 1660.20(d).

> Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in § 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

It is to be noted that the local board did *not* have authority or jurisdiction to order the appellant to report for civilian work in lieu of induction *unless and until* the local board had obtained the approval of the Director of Selective Service. Therefore, it is obvious that *the local board did not make any order for the appellant to report for civilian work on the evening of March 14, 1966.* The minutes of the local board meeting indicate that *no order was made that evening* (F 13, 52). *Therefore, as of March 14, 1966 the local board had not "issued" any order directing the appellant to report for civilian work in lieu of induction, and had not "authorized" the Clerk to issue such an order on its behalf.*

Section 1604.59 of the Selective Service Regulations[7] provides as follows:

> "Official papers *issued* by a local board may be signed by *the clerk* of the local board if he is *authorized* to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board, provided, that the chairman or a member of the local board must sign a particular

---

[7]32 CFR Section 1604.59.

> paper when specifically required to do so by the Director of Selective Service."

The fact that the local board had *not* ordered the appellant to report for civilian work is amply demonstrated by the succeeding documents in appellant's file. On March 24th the file was forwarded to the National Director via State Headquarters. The letter of transmittal stated in part:

> "It is *requested* that the Director approve and *authorize the ordering* of subject registrant to perform the above specific work" (F 55).

The State Director forwarded appellant's file to the National Director on March 28, 1966; and, after mentioning the type of civilian work which the local board had determined was available, stated as follows:

> *"The local board requests authority to so order him"* (F 58).

The National Director's office granted the request of the local board and, by its letter of transmittal to the California State Director, advised as follows:

> *"The issuance of an order by the local board . . . is approved"* (F 57).

California Headquarters returned the appellant's file by letter of April 19, 1966. This letter was *not* addressed to the Clerk of the local board, but to "Gentlemen"—the board members themselves. The letter specifically provides that "the registrant should be ordered to report to his local board office . . ." (F 56). *The letter does not state that the Clerk may issue an*

Order to Report for Civilian Work without further board action.

The matters which State Headquarters directs the Clerk to do, *after the order has been made by the local board,* are specifically set forth in the remaining portions of this letter. The Clerk is directed to prepare instructions to the registrant, and to sign and to prepare and sign a statement noting the failure of the registrant to appear, if this is the case (F 56). It is noteworthy that the State Director did not even request or instruct the Clerk to prepare or sign the "Order to Report for Civilian Work"; this is doubtless because the Clerk could not even sign such an order unless expressly authorized to do so by the local board.[8]

The evidence was uncontradicted that, after the receipt of the abovementioned letter from State Headquarters on April 20, 1966 (see receipt date at upper right portion of letter at F 56), *the local board did not meet, did not consider the appellant's classification or assignment to any particular form of civilian work, did not order him to report for such work, and did not authorize or direct the Clerk to so order him.* There are *no* documents in Plaintiff's Exhibit 1 which would substantiate or prove any of these acts, and the minutes of the local board do not reflect any such action (F 13). The person who was Clerk of the local board at this time—April 22, 1966—testified that the local board would have met on April 4th or 11th, 1966

---

[8]See 32 CFR Section 1604.59.

(*prior* to obtaining the approval of the National Director), and that she had no recollection of any special meeting during April (RT 31-32).

In the administration of the Selective Service System, it is obvious that there are certain actions which must be taken by "the local board"—that is, by official action of the members of the board—and other actions of a purely routine nature which may be performed by the Clerk on behalf of the board *if* the authority to do so has been delegated to him.

Section 1623.1(a) of the Regulations[9] "Commencement of Classification" provides in part as follows:

> "Each registrant shall be classified as soon as practicable after his Classification Questionnaire (SSS Form No. 100) is received by the local board . . ."

Acting pursuant to this regulation, the *members* of the local board met on September 14, 1964, and, by a vote of 4-0, classified the appellant in category I-O (F 3, 12).

When the appellant first appeared in person before the local board on February 14, 1966, no representative of the State Director was present as the local board had provided insufficient notice of the meeting in violation of Regulation 1660.20(c).[10] The local board, even on this procedural matter, voted 3-0 that the meeting would be rescheduled and that the appellant would be advised of a new date (F 12). The only

---

[9] 32 CFR Section 1623.1(a).

[10] 32 CFR Section1660.20(c).

other instance in which the local board members met and voted, as indicated by the appellant's file, was at the meeting of March 14, 1966, when they determined, by a vote of 3-0, that work at the Los Angeles County Department of Charities was "appropriate to be performed by the registrant and that such work was available" (F 52).

Two other facts should be mentioned here: First, the "Special Report for Class I-O Registrants" provides that:

> "If no agreement can be reached at such meeting *the local board,* after approval by the Director or Selective Service, *will order you to perform such work as deemed appropriate by the local board*". (F 39).

It is noteworthy that this Selective Service Form does *not* indicate that the *Clerk* of the local board shall make such an order, but that *the local board itself* will order the registrant to perform such work.

The language in this selective service form is consistent with the terms of Section 1660.30 of the Regulations.[11] This regulation provides in part as follows:

> "Any registrant who knowingly fails or neglects to obey an *order from his local board* to perform such civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under Title I of the Universal Military Training and Service Act, as amended."

[11] 32 CFR Section 1660.30.

The language "an order from his local board" obviously cannot mean the unauthorized sending of a selective service form by any of the clerical personnel in the local board office, but can only logically be interpreted to be an instance in which the local board has met and exercised its judgment in determining that any such an order shall issue.

Secondly, much of the correspondence in the appellant's Selective Service File, when issuing from the local board office, contains the statement "By Direction of the Local Board."[12] However, the purported "Order to Report for Civilian Work" does not even bear this statement (F 60).

There are *no* Selective Service Regulations which authorize a Clerk or other ministerial person to issue a formal order without a meeting and determination by members of the local board. Even the signing of official papers by the Clerk is specifically limited by the provisions of Section 1604.59 of the Regulations, referred to above.[13]

Finally, Section 1604.56[14] provides in part as follows:

> "Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present *shall decide any question or classification.* Every

---

[12] E.g., F 43, 45, 47, 49, 51.
[13] 32 CFR Section 1604.59.
[14] 32 CFR Section 1604.56.

member present, unless disqualified, shall vote on every question or classification".

It is obvious that the determination of whether or not a registrant is to be ordered to report for civilian work in lieu of induction is a "question" within the meaning of said section. It is to be noted that this regulation is in mandatory—*i.e.* "shall"—language. In other cases in which local boards have failed to abide by mandatory language of the regulations the Courts have uniformly held that judgments of acquittal must be directed.[15]

Appellant submits that there are substantial differences between cases in which registrants are ordered to report for induction in the armed forces, and those, like the present case, in which an order to report for civilian work in lieu of induction is involved. In induction cases, once the number of men to be inducted in any given month is given to the local board, the question of which registrant goes first is predetermined, as the order of induction depends upon the birthday of each registrant.[16] Once a registrant's number has been reached for induction, all further decisions are in the hands of the military services rather than the local board. Whether a registrant passes the pre-induction physical is determined by armed forces personnel, as is the question of whether he is inducted

---

[15]*See Boyd v. U.S.*, 269 F. 2d 607 (9th Cir., 1959); *U.S. v. Zieber*, 161 F. 2d 90 (3rd Cir., 1947); *Atkins v. U.S.*, 204 F. 2d 269 (10th Cir., 1953).

[16]See 32 CFR Sections 1631.7, 1632.1-16. There are certain exceptions, of course, such as delinquent registrants and volunteers, that are not applicable here.

into the army, navy, air force, marines or coast guard, depending upon the status of the military services and their calls for personnel at any particular time.

Just the opposite is true in proceedings involving civilian work in lieu of induction. Up to the time the local board makes and issues its order, it must in effect make a determination that the work is currently available; that the registrant is qualified to perform it; that there is no new evidence in the registrant's file which would indicate that any change in civilian work assignment is appropriate; and that the registrant should be ordered to report for instructions. All of these matters involve discretion and judgment on the part of the members of the local board which is totally absent in induction cases.

II

AFTER ADVISING THE APPELLANT THAT HIS CLASSIFICATION WAS STILL UNDER REVIEW, AND REQUIRING HIM TO SUBMIT NEW INFORMATION, THE LOCAL BOARD FAILED TO CONSIDER THE NEW INFORMATION

Appellant's Selective Service File reflects that, after the meeting with the registrant on March 14, 1966, the local board desired further information from him. As a result, a "Current Information Questionnaire" (SSS Form 127) was mailed to the appellant on March 15, 1966 (F 53-54). It is apparent that this was not a "routine" mailing, for on the face of the form at the portion reading "Complete and return before.........", the word "before" is crossed out and the

additional words *"at once"* are added (F 53). Ordinarily, registrants are given 10 days or more to complete and return such forms.

Two other portions of this form are of particular interest: The first sentence thereof provides:

> "The law requires you to fill out and return this questionnaire on or before the date shown to the right above *in order that your local board will have current information to enable it to classify you."*

The final statement of the form provides:

> "Notice.—Imprisonment for not more than five years for a fine of not more than $10,000.00, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate *regarding or bearing upon a classification"* (F 54).

The appellant was required by law to complete and return this questionnaire.[17] If he failed to perform this duty, he would have been a delinquent as defined in Section 1602.4 of the Regulations.[18] In such event, appellant could have been reclassified in class I-A-O and ordered to report for induction.[19]

Appellant returned the "Current Information Questionnaire" on March 24, 1966, and, for the first time, advised his local board that he was engaged in an occupation other than that of a student or house-

---

[17] See 32 CFR Section 1623.1(b).

[18] 32 CFR Section 1602.4.

[19] 32 CFR Sections 1642.10-1642.21.

painter, to wit, a cashier at San Francisco International Airport. Had the local board considered this new information, it could have had a bearing upon the type of civilian work he would be ordered to perform in lieu of induction.

However, the appellant's Selective Service File contains no indication that the local board ever considered this information prior to the time the purported order to report was issued by one of the clerical personnel (F 13). In fact, the minutes of the local board (F 13) do not even reveal the receipt of this information by the local board, although in each and every other instance in which the appellant returned selective service forms to the local board, the receipt was duly entered in the minutes (F 12).

Appellant submits that the "Current Information Questionnaire" was not sent out on March 15, 1966, without any purpose whatsoever, particularly in view of the fact that the appellant was ordered to return said questionnaire "at once". Yet, there is absolutely nothing in the file to indicate that the local board ever met or considered the new information which might have resulted in some change in the registrant's status, work assignments, etc. In situations of this kind, it is not for the trial court to presume by guess, speculation or conjecture what the local board would or would not have done. As the local board required new information, and received it, it was error for the board not to have considered it. As the purported "order" was sent from the local board without any consideration by the board members of this new in-

formation, appellant was not afforded procedural or substantive due process. Therefore, his failure to obey the purported "order" did not constitute a criminal act.

III

THE PURPORTED "ORDER" TO REPORT FOR CIVILIAN WORK WAS NOT VALID, AS IT WAS NOT SIGNED BY ANY DULY AUTHORIZED PERSON

Section 1604.59 of the Selective Service Regulations[20] provides in part that:

> "Official papers issued by a local board may be signed by the Clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board . . ."

It is to be noted that this regulation does not refer to "all clerical personnel", but specifically mentions "*the* clerk". The uncontradicted evidence is that Barbara Jones, the person who signed the "Order to Report for Civilian Work" was *not* the Clerk of local board No. 57, San Mateo County, at that time. Indeed, it appears that she was not even recommended for this position until June 21, 1966, some two months later (Defendant's Exhibit C; RT 28-29). The file indicates that Barbara Jones was not actually appointed Clerk until September 19, 1966 (Defendant's Exhibit B; RT 26).

---

[20] 32 CFR Section 1604.59.

The language in Government's Exhibit 2 to the effect that the "local board passed unanimous resolution authorizing clerical personnel to sign all forms and orders necessary to completion of local board business" is not sufficient to remedy the procedural defects in this case. Firstly, the governing regulation is that of Section 1604.59,[21] which provides that papers may *only* be signed by "*the* Clerk" *not* by "clerical personnel". Secondly, it is obvious that the Government Exhibit 2 can only apply to or authorize the Clerk to sign or issue orders, *once the orders have been made by the local board.* That is, the ministerial act of signing orders may properly be delegated to a Clerk, but the policy decision—the making of the order—cannot be so delegated. As previously mentioned, Section 1604.56 requires the members of the local board to decide "any question or classification."[22]

The appellant submits that, by virtue of all of the aforesaid facts, there was simply no valid order by the local board directed to him to report for civilian work in lieu of induction. There is a complete failure of proof that either the local board ordered the appellant to report, or that it authorized its clerk to do so on its behalf.

At various times the Ninth Circuit Court of Appeals and other federal courts have held that, if there is any question concerning the validity of local board orders, any doubt must be resolved in favor of the appellant, and that in cases involving the liberty of

---

[21] 32 CFR Section 1604.59.
[22] 32 CFR Section 1604.56.

defendants, a presumption of administrative regularity is not sufficient to overcome defects in the proceedings.

In *Franks v. United States,* 216 F. 2d 266 (9th Cir., 1954) the Court, in reversing the defendant's conviction stated as follows at page 269:

> "In a criminal prosecution of this kind, the burden is upon the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing upon that validity, than *we must view the record in the light most favorable to the appellant* as we proceed to construe its meaning."

In *Kretchet v. United States,* 284 F. 2d 561 (9th Cir., 1960) the Court, in reversing the defendant's conviction stated as follows at page 566:

> "It was encumbent upon the United States to prove a valid induction order as a basis for appellant's conviction."

In *Knox v. United States,* 200 F. 2d 398 (9th Cir., 1952) the Court, in reversing the defendant's conviction, stated at page 402:

> "But, it is suggested, a presumption of regularity or of the due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claims of the registrant, but in the light of them it took action to continue in effect his original I-A classification. *We think the Court may not indulge the presumption, at least in the latter respect,* in the condition of the records in the case."

In *United States v. Stetler,* 258 F. 310 (3rd Cir., 1958) the Court, in reversing the defendant's conviction, stated at page 316:

> "Good faith and honest intention on the part of the local board is not enough. There must be full and fair compliance with the provisions of the Act and the applicable Regulations."

Finally, in *United States v. Alvies,* 112 F. Supp. 618 (N.D. Cal. 1953) District Judge Oliver J. Carter stated as follows:

> "But assumptions on the part of the court cannot substitute for evidence where the result would be to convict a man of a felony. As the Supreme Court said in the Estep case, supra, 327 U.S. at pages 121-22, 66 S.Ct. at page 427:
>
> > '* * * We are dealing here with a question of personal liberty. A registrant who violates the Act commits a felony. A felon customarily suffers the loss of substantial rights. Sec. 11, being silent on the matter, leaves the question of available defenses in doubt. But we are loath to resolve those doubts against the accused.'
>
> "Where the record of selective service boards action in classifying a registrant is questionable, presumptions are resolved in favor of the registrant" (Citing numerous cases).

IV

THE PURPORTED ORDER TO REPORT FOR CIVILIAN WORK WAS IMPROPERLY ISSUED, AS THERE WAS NO EVIDENCE THAT THE WORK IN QUESTION WAS "CURRENTLY AVAILABLE"

In order to ascertain what work was "currently available" the appellant's local board wrote to the State Director on December 20, 1965, requesting that the State Director forward three types of "available, appropriate employment" (F 43). On December 22, 1965 the State Director responded, and advised the local board that three types of civilian work were "*available* for class I-O registrants *at the present time*" (F 34).

More than a month later, California Headquarters again wrote to the local board and specifically stated in part as follows:

> "*Unless* the file contains *current information* that such work is available, the State Director should be requested to obtain such information" (F 48).

In spite of this express instruction, the local board did not thereafter request or obtain any further information concerning the availability of civilian work. As a result, the purported "Order to Report for Civilian Work" dated April 22, 1966, was sent to the appellant some *four months after* the local board had been advised that such work was available.

The failure of the local board to ascertain if the work was currently available was a material procedural error which it should have corrected. As to this matter, as well as to the other errors described

in this brief, the express language of paragraph 7 of Local Board Memorandum No. 64 is appropriate:

> "7. Corrections of Procedural Errors. If a material error occurs at any point in the processing of a class I-O registrant for assignment to civilian work, that error should be corrected and the processing resumed from that point even though it requires a repetition of previous actions."[23]

CONCLUSION

Appellant's conviction should be reversed upon each and all of the following grounds:

1. There was in fact no valid "order" directing the appellant to report for civilian work in lieu of induction, as the local board, after receiving authorization from the National Director to so order appellant, did not meet, did not consider his classification, did not issue any order itself, and did not authorize its clerk to issue any such order.

2. The local board committed prejudicial error in failing to consider the new information submitted by the appellant when required to do so by the express direction of the local board.

3. The purported "order" to report for civilian work was not issued or signed by any person having authority to do so.

---

[23] Local Board Memorandum No. 64, issued by the National Director of the Selective Service System, March 1, 1962, "Subject —Civilian Work in Lieu of Induction", paragraph 7.

4. There is no evidence appearing in the file that the work which appellant was purportedly ordered to perform was currently available when the "order" was issued.

Wherefore, the appellant prays that judgment of the District Court be reversed, and the cause remanded with direction to the trial court to enter a judgment of acquittal and discharge the appellant.

Dated, San Francisco, California,
December 12, 1967.

Respectfully submitted,
Clark A. Barrett,
Counsel for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Clark A. Barrett,
Counsel for Appellant.